Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Policy and Rules Concerning the | ) | |
| Interstate, Interexchange Marketplace | ) | CC Docket No. 96-61 |
| | ) | Phase II |
| Implementation of Section 254(g) of the | ) | |
| Communications Act of 1934, as amended | ) | |



# AMERITECH COMMENTS

## I. Introduction and Summary

Ameritech respectfully files these comments in response to sections III, VII, and VIII of the Commission's Notice of Proposed Rulemaking (Notice) in the above-captioned proceeding. While the Commission raises a number of issues in these sections, Ameritech limits its comments to one issue: the Commission's proposal to prohibit nondominant interexchange carriers from filing tariffs. Ameritech opposes this proposal for two reasons. First, tariffs offer a number of important benefits that further the interests of carriers and consumers. Second, the Commission overstates any potential adverse effect tariffs can have on competition in the interstate interexchange marketplace.

## II. The Commission Ignores Important Benefits of Tariffs

In proposing to prohibit nondominant carriers from filing tariffs, the Commission ignores a number of important benefits that tariffs offer both to carriers and consumers. In particular, the Commission ignores that tariffs

enable consumers and carriers to formalize their relationship quickly and with minimal inconvenience. When consumers decide today to sign up for long-distance service or to change long-distance carriers, they can do so with a simple telephone call to their chosen long-distance company or to their local exchange carrier. The change is effected virtually immediately, without the need for a written contract or other written documentation. This is possible because, under the filed rate doctrine, the terms and conditions on which the customer takes service are established in the carrier's FCC tariff.

If the Commission prohibits carriers from filing tariffs, however, carriers and consumers would have to either sign written contracts or do business without any formalized relationship. Neither option is desirable from either consumers' or carriers' standpoint.

If carriers deem it necessary to replace tariffs with written contracts, the costs of doing business would increase substantially. Approximately 150 million telephone lines are presubscribed to long-distance carriers today. Contracts would have to be obtained with respect to each of these lines. The additional administrative costs of such an undertaking would be substantial and are nowhere addressed by the Commission. The Commission also fails to address how, without tariffs, carriers could establish a legal relationship with so-called "casual" callers -- that is, those who place calls through carriers other than their presubscribed carrier, either through the use of access codes or by dialing 0+ when they are away from home.

Moreover, written contracts would also make it much more burdensome for consumers to sign up for service or to change carriers.

Written contracts designed to capture the intricacies of tariffs could be, of necessity, complex and lengthy. Many customers could be confused and intimidated by the prospect of signing an involved legal document to memorialize a relationship that in their minds was once no more complex than a single telephone call. All customers would be subjected to inconveniences they do not now face.

These added burdens would likely have a negative impact on interexchange competition. As the Commission noted in declaring AT&T nondominant, evidence submitted by AT&T indicates that as many as one fifth of all residential customers change interexchange carriers at least once a year.[1] This high churn rate, which is due, in no small part, to the ease of switching carriers, promotes more vigorous competition by keeping carriers on their competitive toes. Making it more cumbersome for customers to switch carriers would only reduce competition.[2]

In addition, contracts create transaction costs that interfere with the efficient allocation of societal resources. Specifically, if consumers are forced to execute written contracts in order to switch carriers, they will switch to a more efficient carrier (that offers better or cheaper service) only if the benefits

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1 Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427, released Oct. 23, 1995, at para. 63.

2 Indeed, the anticompetitive effects of detariffing could be felt most acutely by new entrants in the marketplace because incumbent carriers may be able to rely on their relationships with customers to avoid contracts. For example, incumbent carriers might be able to simply inform customers that they will continue to receive service in a manner consistent with the old tariffs. Customers, recognizing that those tariffs had been filed with regulators, and comfortable with the service they had been receiving, would be unlikely to question the terms of those tariffs. New entrants, on the other hand, with no tariffs and no track record to give assurance to customers, would not have this flexibility and lattitude. Thus, detariffing could exacerbate the advantages of incumbent carriers.

of the switch outweigh the transaction costs of making the switch. Increasing these transaction costs will thus tend to bind consumers to carriers that are less efficient, leading to a suboptimal allocation of societal resources.

Conversely, if, because of the costs to themselves and consumers, interexchange carriers decided to transact business without written contracts, other problems would arise. For example, carriers would face the issue of how to effect changes in the terms and conditions on which they offer service. Without tariffs and without a contract that specifically entitles a carrier to change its rates or other terms of service without prior notice, carriers might be forced to notify customers of impending changes through billing inserts. If that were the case, mandatory forbearance would have the unintended consequence of effectively increasing the advance notice period for changes in the terms and conditions of service from one day to up to thirty days. It could also increase the administrative costs associated with changes in the terms and conditions of service. Both results would be directly contrary to the Commission's stated goals of "enabling non-dominant carriers to respond quickly to changes in the market, and reducing administrative costs on carriers[.]"[3]

Oral arrangements for service could also lead to customer confusion and ambiguity about the terms and conditions of service. Disputes and misunderstandings would likely ensue; customer complaints would likely increase.

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3 Notice at para. 31.

Another significant issue the Commission does not adequately address is the effect of detariffing on liability provisions. To Ameritech's knowledge, all interexchange carriers currently include in their interstate tariffs provisions that limit their liability, at least for conduct that does not constitute "willful misconduct" or "gross negligence."[4] These tariff provisions have long been recognized as valid and in the public interest. This is, in part, because, given the nature of telephony, some outages and network problems are inevitable, and because, without liability limitations, carriers would be exposed to unforseeable and potentially staggering claims for economic losses, the costs of which could have a substantial impact on their ability to provide affordable service.[5]

In the Notice, the Commission simply assumes, without explanation, that detariffing would service the public interest because "the legal relationship between carriers and customers will much more closely resemble the legal relationship between service providers and customers in an unregulated environment."[6] While Ameritech would agree as a matter of principle that the public interest is generally best served by treating carriers to the maximum extent possible like providers of unregulated products and services, liability issues faced by common carriers present special considerations that at least warrant some level of analysis.

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4 See, e.g. Richman Brothers, 10 FCC Rcd 13,639 (CCB 1995).

5 See, e.g., J. Meyer & Co. v. Illinois Bell Telephone Co., 88 Ill. App. 3d 54, 57, 409 N.E. 2d 557, 561 (2d Dist. 1980); Waters v. Pacific Telephone Co., 523 P.2d 1161, 1164 ( Cal. 1974); Siegel v. Western Union Tel. Co., 312 Ill. App. 86, 91, 37 N.W.2d 868, 870-71 (1st Dist. 1941).

6 Notice at para. 34.

For example, consumers can today sign up for long-distance service through their local exchange carrier. Not only does the interexchange carrier not procure a written contract for service, the interexchange carrier may have no direct contact at all with the customer. Such a situation is not typical of most commercial entities. While the Commission appears to assume that, without tariffs, carriers would include liability provisions in customer contracts, the Commission does not explore whether contracts are actually feasible. In particular, it does not explore whether it is practicable for interexchange carriers to contract individually with thousands, if not millions of customers annually. If contracts are not feasible, common law principles would govern the liability of interexchange carriers. The impact of such a result on rates, investment incentives, universal service considerations, and other matters that are critical to the public interest is nowhere addressed by the Commission.

Nor does the Commission address whether carriers could effectively insulate themselves from excessive liability risks through contracts. In upholding the liability limitations in tariffs, courts have relied on the filed rate doctrine, not general contract law.[7] If courts apply general contract principles to liability clauses in contracts between carriers and customers, without taking into account the unique issues raised by liability of long-distance providers, the fate of these clauses is by no means clear and might even vary from jurisdiction to jurisdiction.

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7 See Richman Brothers, supra.

Nor does the Commission identify any advantages of detariffing liability limitations that might offset these risks. Given the number of customers they serve, even interexchange carriers that contract with their customers might not be able to negotiate liability provisions with each customer individually because of the transaction costs involved. In that case, carriers would be forced to offer standard contracts with standard liability clauses, much like those contained in tariffs. The only difference would be that the enforceability of these clauses would be thrown into question. Thus, it is by no means clear that market forces would permit negotiated liability clauses to any greater extent than do tariffs.

Finally, it is not clear that marketplace solutions would be superior, even assuming that carriers were in a position to negotiate liability provisions individually with their customers. One (of many) potential problems has to do with informational asymmetries. In order for the market to work properly, negotiating parties must have information that enables them to make rational decisions. For example, if telephone companies are to assume the risks of liability with respect to certain customers, they must have information about the magnitude of such risks so that they can properly charge for assuming them. Determining the extent to which a customer or customers presents a risk of liability, however, requires knowledge of the use the customer makes of the network and the steps, if any, the customer has taken or will take to reduce the risk or the amount of loss in case of a network problem. Telephone carriers do not have this information. Rather, it is uniquely within the possession of customers.

In proposing mandatory detariffing, the Commission does not explore these issues at all. It does not explore what liability rules would result in the absence of tariffs, or the impact these rules would have on the costs of providing service and other matters that are of critical importance. Nor does the Commission address the administrative costs associated with detariffing. Instead, the Commission bases its proposal almost entirely on one alleged benefit of detariffing -- reducing the risk of coordinated pricing. As discussed below, the Commission grossly overstates this benefit.

## III. Tariffs Do Not Increase the Risk of Anticompetitive Conduct

The Commission's proposal to implement forbearance on a mandatory basis appears to rest principally on one critical assumption -- that tariffs facilitate coordinated pricing. Ameritech believes that the Commission overstates the relationship between tariffs and any tacit collusion that is occurring in the marketplace. While tariffs may provide one convenient vehicle for carriers to monitor the rates of their competitors, surely it would not be difficult for carriers to continue monitoring the rates of their competitors even if tariffs were prohibited. Indeed, all it would take is a simple telephone call by an employee of a carrier posing as a prospective customer of the competitor. Thus, there can be no doubt that interexchange carriers will remain aware of their competitors' rates with or without tariffs. In reality, detariffing would be likely to reduce the availability of rate information to consumers far more than to carriers.

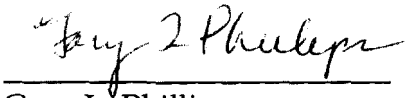
If the Commission is concerned about the potential for tacit collusion in the interexchange marketplace, a far more effective approach would be to

take steps to address the oligopolistic structure of that market. Specifically, the Commission should exercise its authority under the Telecommunications Act of 1996 to approve expeditiously in-region long-distance applications by the Bell Operating Companies (BOCs). In addition, the Commission should ensure that BOCs can compete viably by according them the same nondominant regulatory status enjoyed by the incumbent carriers. Only then will the structural characteristics of the market that permit and facilitate coordinated pricing be remedied.

## IV. Conclusion

For the reasons discussed above, the Commission should reject its proposal to prohibit nondominant interexchange carriers from filing tariffs.

Respectfully Submitted,



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